

BETWEEN

FH Ltd [FH]
APPLICANT

AND

TS Ltd [TS]
RESPONDENT

Date of Order:

26 September 2016

Referee:

Referee Paton-Simpson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that TS Ltd is to pay the sum of \$9,200.00 to FH Ltd on or before 6 October 2016.

Once payment has been made, FH Ltd is to allow TS Ltd to collect the forklift at its own cost at a mutually convenient time. If the forklift has not been collected by 27 October 2016, FH Ltd may keep or dispose of the forklift as it sees fit.

Facts

In May 2015, FH Ltd (FH) purchased a Jungheinrich pallet mover forklift from TS Ltd (TS) after seeing it advertised on Trade Me. The Trade Me listing stated “demo model with low hours”, “new price over \$20,000” and “grab a bargain!” FH rang TS before purchasing and claims that TS said the forklift had been brought in for a particular customer but the lease was cut short, and that it was “out on demo” at an orchard, but would be available if the orchard did not want it.

FH claims that the battery failed to perform well from the time of purchase, and within four months the battery needed to be replaced. At this point, FH was informed that the forklift was a 2004 model, whereas FH had thought it was near new.

FH now claims a refund of the \$9,200.00 price of the forklift from TS. The issues to be determined are:

Did TS breach s 9 of the Fair-Trading Act 1986 by misrepresenting the age of the forklift?

If so, what remedy (if any) should be granted to FH?

Did TS breach s 9 of the Fair-Trading Act 1986 by misrepresenting the age of the forklift?

Since TS trades in forklifts and machinery, the Fair Trading Act 1986 (FTA) applies. Section 9 of the FTA provides, “No person shall, in trade, engage in conduct that is

misleading or deceptive or likely to mislead or deceive.” If a breach of s 9 causes a person to suffer loss, the Tribunal may grant a remedy under s 43.

TS did not state anything in the advertisement or on the telephone that was not literally true, except perhaps the claim that the forklift was a bargain, although this sort of language is usually treated as mere puffery rather than a statement of objective fact.

However, the courts have held that silence can constitute misleading conduct where there is a duty to speak in all the circumstances, or where the circumstances give rise to a reasonable expectation of disclosure. I accept FH’s argument that the use of the term “demo model” and the mention of the new price gave the impression that this was a near new machine. The claim that it was a bargain reinforced this impression in the context of the other statements. I find that the description of the forklift as a demo model with low hours, accompanied by mention of the new price and the reference to a “bargain”, gave rise to a duty to clarify that the forklift was not a near-new machine. TS’s failure to clarify that the machine was actually eleven years old therefore constituted misleading conduct under s 9.

Conclusion

If so, what remedy (if any) should be granted to FH?

Section 43(3)(f) of the FTA allows the Tribunal to award damages to a party who has suffered loss by misleading or deceptive conduct. TS argued that age is not as important as hours for a forklift. However, the sales manager for another machinery dealer, gave evidence that the value of a machine is determined by a balance of hours and age, as well as the age of the battery. TS initially thought it had replaced the battery before the sale, but admitted that it had been mistaken, and that the forklift had the original 2005 battery.

The sales manager gave further evidence that that the forklift FH purchased for \$9,200.00 has a trade value of only \$1,500.00 plus GST. While the market value may

be somewhat higher, I am satisfied that the forklift is worth significantly less than the price paid, so FH has suffered loss by being induced to buy it.

Therefore, I find that FH should be entitled to cancel the contract and get a full refund from TS, and that TS should collect the forklift at its own cost.